



OFFICE OF THE
ATTORNEY GENERAL OF TEXAS

The Public Purchaser's Guide to Antitrust

Antitrust Section, Consumer Protection Division



Topics Covered

- ▶ **What is antitrust? (Basic Concepts)**
- ▶ **How do antitrust violations affect buyers?**
- ▶ **How can you spot potential antitrust violations and guard against them?**



History of Antitrust

Origins



Special interest “trusts” dominated politics and the national economy in the late 1800s



History of Antitrust



Trust certificates were used to mask owner's identity while trustees secretly controlled the market



Teddy Roosevelt (President, 1901-1909), the original trustbuster.



Overview of Antitrust Section

What we do:

- ▶ Enforce state and federal antitrust law
 - Texas Free Enterprise & Antitrust Act
 - Sherman Act
 - Clayton Act
- ▶ Outreach

Who we represent:

- ▶ State and State Agencies
- ▶ Political Subdivisions & Tax-Supported Entities (with consent)
- ▶ Consumers (limited)



Overview of Antitrust Section

► What we don't do:

- Direct officials to choose one procurement method over another
- Investigate procurement or bidding violations that don't raise antitrust concerns
- Make sure public entities get the best price or value for goods and services



Basic Concepts

Three Types of Antitrust Violations

- ▶ **Monopolization**
 - Unlawfully acquiring or maintaining the power to fix prices and exclude competitors
- ▶ **Illegal Mergers**
 - Where the effect of the merger may substantially lessen competition
- ▶ **Collusion and Conspiracy**
 - **Competitors making agreements to remove or reduce competition in the marketplace**



Effects in the Marketplace

► Without Competition:

- Higher Prices
- Poorer Quality
- Less Choice
- Less Innovation

Antitrust statutes are premised on a congressional determination that “unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress....” *N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 4 (1958)



Monopolization & Mergers

What Can You Do About Monopolies/Mergers?

- ▶ Let us know if you suspect a dominant vendor is trying to drive its competitors out of business.
- ▶ Let us know if you hear of a potentially problematic merger.
- ▶ Assist us when contacted for interviews.



Anticompetitive Agreements

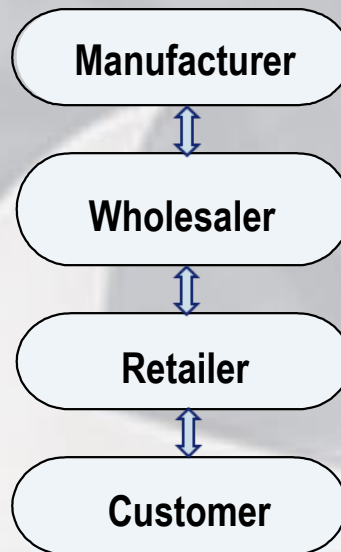
Collusion: What's Prohibited

- ▶ “Contracts, combinations or conspiracies in restraint of trade”
 - There MUST be an agreement, BUT agreements may be hard to prove
 - “Conscious parallelism” alone is not violation
 - Conspirators try to hide agreement



Types of Anticompetitive Agreements

Vertical Agreements Typically less suspect



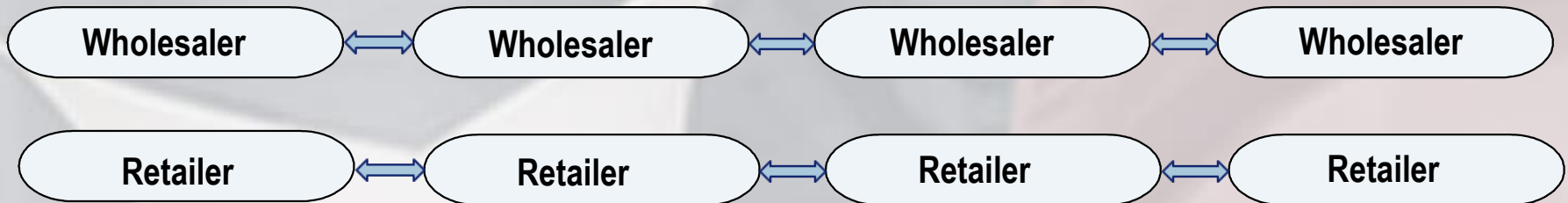
- Resale Price Maintenance
- Exclusive Distributorships



Types of Anticompetitive Agreements

Horizontal Agreements Inherently suspect

For example:



Between competitors at the same level of the market



Types of Anticompetitive Agreements

- ▶ Horizontal Agreements
 - Price Fixing
 - Market Allocation/ Customer Allocation
 - Bid Rigging
 - Complementary Bidding
 - Bid rotations
 - Bid suppression

Conspirators often mix and match



Horizontal Agreements: Bid Rigging/Customer Allocation

[illegible]



Indicators of Collusion

What Can You Do About Collusion?

- ▶ **Recognize Conditions Favorable to Collusion**
 - Few vendors in the market
 - No easy substitutions
 - Frequent interactions or information sharing between competitors



Indicators of Collusion

► Recognize Suspicious Statements or Behavior

- Irregularities in appearance or submission of bids, e.g., suspicious joint bid
- The absence of bids or responses when more are expected (could also be caused by market conditions or RFP)
- Refusals to bid alluding to agreement or understanding with competitor
- Refusal to bid or offer quote due to “ethical concerns” about poaching customers



Indicators of Collusion

What Can You Do About Collusion?

► Recognize Suspicious Bidding or Pricing Patterns

- Some bids are much higher than previous bids or estimated costs
- Consistent % margins between winning and losing bids
- A vendor always wins a bid in a certain area for a particular service, or in a fixed rotation with other bidders
- Last look requested (may or may not implicate antitrust)



Guarding Against Collusion

What Can You Do About Collusion?

- ▶ Draft RFPs to encourage maximum participation
 - Minimize use of tight specs:
 - Don't tailor bids to one particular product or supplier.
 - Don't use specs written by or copied from a manufacturer.
 - Don't use brand names in specs.



Guarding Against Collusion

What Can You Do About Collusion?

- ▶ Advertise in a variety of ways.
- ▶ Insist on compliance with procedures.
- ▶ Maintain and review procurement records.
- ▶ Don't disclose cost estimates before awarding a contract (unless absolutely required)
- ▶ Don't disclose the identity of proposal holders or other bidders



Guarding Against Collusion

What Can You Do About Collusion?

- ▶ Assignment Clause- Part B.5.6, Comptroller's RFP Template
- ▶ AT Certification Statement--Gov. Code §2155.005



Consequences of Collusion

Potential Consequences for Antitrust Violators:

- ▶ State/Federal Civil Antitrust Prosecution:
 - Treble Damages, Penalties, Attorneys' Fees and Investigative Costs





Consequences of Collusion

Potential Consequences for Antitrust Violators

- ▶ Private litigation and class action suits by purchasers
- ▶ Debarment
- ▶ State/Federal Criminal Prosecution:
 - Jail & Fine



Contact Information

To Sum Up:

- Use us as a resource.
- Contact us with concerns/suspicious.
- Assist us with our investigations.

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Antitrust Section, Consumer Protection Division
Main number: (512) 936-2334